

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
to order Consumers Energy Company to show)	
cause why it should not be found in violation of the)	Case No. U-16113
Commission's December 22, 2005 order in)	
Case No. U-14347.)	
_____)	

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on March 29, 2010.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before April 12, 2010, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before April 22, 2010. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions

must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

March 29, 2010
Lansing, Michigan
dmp

Barbara A. Stump
Administrative Law Judge

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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Case No. U-16113

PROPOSAL FOR DECISION

HISTORY OF PROCEEDINGS

On December 22, 2005, the Commission issued an order in Case No. U-14347.¹ The Commission found, in pertinent part, that the following amounts of operation and maintenance (O&M) expense should be included in setting the final authorized rates for Consumers Energy Company (Consumers Energy or the Company): forestry O&M expense of \$28,300,000, fossil fueled generating plant O&M expense of \$119,778,893, and nuclear plant O&M expense of \$117,986,000. The Commission adopted three tracking mechanisms for these categories of expenses, each of which operated in a similar manner. The Commission directed Consumers Energy to submit a letter agreeing to make the additional forestry, fossil, and nuclear operations expenditures or to refund any expended amounts to its customers.

On October 13, 2009, the Commission issued an order to show cause initiating this proceeding. In that order, the Commission stated:

¹*In the matter of the application of Consumers Energy Company for authority to increase its rates for the generation and distribution of electricity and for further relief.*

The Commission is informed that Consumers' 2007 report on fossil fueled plant O&M expense, nuclear O&M expense, and forestry expenses and line clearing activities, which was submitted to the Staff on April 10, 2010, reveals that during 2007 Consumers underspent by \$6,503,420 for forestry expenses and line clearing activities during 2007 and under spent by \$7,584,328 for fossil fueled plant O&M expense during 2007. The Commission also is informed that, to date, Consumers has not refunded either the under spent \$6,503,420 for forestry expenses and line clearing activities or the under spent \$7,584,328 for fossil fueled plant O&M expense to its customers. (Order, p. 4.)

As a result, the Commission directed Consumers Energy to show cause why it should not be found in violation of the Commission's December 22, 2005 order in Case No. U-14347. It instructed Consumers Energy to file thorough and complete details regarding the Company's expenditures for each of the three categories for the calendar years 2006, 2007, and 2008, as well as a summary of all available data for the forestry expenditures for 2009. The Commission also directed that Consumers Energy's response explain why the refunds required by the December 22, 2005 order have not yet occurred.

Consumers Energy filed its response to the order on October 30, 2009, along with the testimony and exhibits of three witnesses: Richard J. Ford, Vice President, Energy Delivery; David B. Kehoe, Director of Staff, Electric Generation; and Ronn J. Rasmussen, Vice President, Rates and Regulation.

A prehearing conference was held on November 19, 2009, at which time the Administrative Law Judge granted the petitions to intervene filed by the Association of Businesses Advocating Tariff Equity and Attorney General Michael A. Cox (Attorney General). The Administrative Law Judge subsequently granted the petition to intervene filed by the Michigan State Utility Workers Council.

Cross-examination was held on February 16, 2010. The testimony of Consumers Energy's witnesses was bound into the record and only Mr. Rasmussen was cross-examined by the Staff. None of the other parties filed testimony, although the Staff offered one exhibit into evidence.

Consumers Energy, the Attorney General, and the Staff filed briefs on March 3, 2010. Consumers Energy and the Staff filed reply briefs on March 17, 2010. The record consists of 65 pages of transcript and 16 exhibits that were admitted into evidence.

SUMMARY OF THE EVIDENCE

Mr. Ford presented details concerning Consumers Energy's forestry/line clearing O&M expense. He stated that the rates resulting from the Commission's December 22, 2005 order went into effect on January 11, 2006 and were based on an annual forestry O&M expense level of \$28,300,000. Because the rates did not go into effective until January 11, 2006, Mr. Ford prorated the \$28,300,000 tracker amount over the remainder of 2006 to arrive at a tracker amount of \$27,524,658 for 2006. However, Mr. Ford stated that the actual spending for 2006 was \$39,696,741, which exceeded the tracker amount by \$12,172,083 as shown on Exhibit A-1. (2 Tr 20-21.)

Mr. Ford went on to explain that spending during 2006 was at a higher level because the Company accelerated the forestry expenditures by shifting some of the expenditures that would have occurred in 2007 and 2008 into 2006. It did so because prior to 2006, electric system reliability had deteriorated for several years and needed to be addressed. He noted that for the five-year period 1999-2003, trees on average caused approximately 28% of the interruptions, and the number of tree-caused

interruptions was trending upwards. By accelerating the forestry expenditures, the Company was able to clear 6,495 miles of Low Voltage and High Voltage Distribution with the forestry O&M expense in 2006, as shown on Exhibit A-2. (Tr 21-22.)

Mr. Ford further indicated that forestry spending in 2007 was \$21,796,580, which was \$6,503,420 less than the annual tracker amount of \$28,300,000. He explained that, on a cumulative basis, total spending for 2006 and 2007 was \$61,493,321, which exceeded the cumulative tracker amount over that period of time by \$5,668,663. (Exhibit A-1; 2 Tr 22.)

In its June 10, 2008 order in Case No. U-15245, the Commission adopted revised retail electric rates for Consumers Energy, which went into effect on June 20, 2008. The Commission continued the forestry tracker, with rates based on an increased annual forestry O&M expense level of \$41,535,000. Mr. Ford explained that the 2008 tracker amount was \$35,351,791, which is a prorated figure reflecting the \$28,300,000 being effective through June 19, 2008 and the \$41,535,669 being effective for the remainder of 2008. The actual forestry spending in 2008 was \$25,652,394, which was \$9,699,397 less than the prorated amount. Total cumulative forestry spending for 2006 through 2008 was \$87,351,791, which was \$4,030,733 less than the cumulative tracker amount for this period of time. Mr. Ford testified that the difference between the actual spending amount and the amount included in rates over the period 2006-2008 was due to the Company's decision to implement a gradual forestry ramp-up in the last half of 2008, following issuance of the June 10, 2008 order increasing the forestry tracker amount. (2 Tr 23.)

Mr. Ford also testified regarding the level of forestry spending in 2009. He stated that Consumers Energy has spent \$40,428,606 through November 14, 2009 as shown on Exhibit A-11. In its November 2, 2009 order in Case No. U-15645, the Commission concluded that the forestry and line clearing tracker requirements should remain in place; however, it adopted rates that reflected an expense level of \$30,300,000. However, for the period from January 2009 through November 14, 2009, Consumers Energy actually spent \$40,428,606, which exceeded the amount included in rates by \$9,936,157 as shown on Exhibit A-11. (2 Tr 32.) Mr. Ford testified that total actual expenses for the period from January 2006 through November 14, 2009 were \$127,574,321 compared to the total forestry tracker amount of \$121,668,897. (Exhibit A-11.) Thus, he concluded that as of November 14, 2009, Consumers Energy spent the amounts included in its retail electric rates since January 2006. (2 Tr 33.)

Mr. Ford testified that although the Company's pattern of expenditures over the four-year period, 2006-2009, did not precisely match the annualized tracker amount in each calendar year period, customers were not harmed. In fact, customers benefited from this spending approach as demonstrated by Exhibit A-12, which shows the total number of miles of lines cleared during that period, i.e., 19,992 miles. He said that amount exceeds, by over 1,000 miles, the number of miles that would have been cleared if expenditures had matched the tracker amount in each calendar year period. Similarly, Exhibit A-13 shows that the actual number of customers positively affected by the actual line clearing activities over this period was 516,000, which exceeds, by 24,000, the number of customers that would have been affected if the expenditures had matched the tracker amount in each calendar year period.

Mr. Kehoe presented the detailed spending information relative to fossil fueled generating plant O&M expenses. He testified that in 2006, Consumers Energy spent \$131,271,479 on this category of O&M expenses, which was \$14,700,000 more than the tracker amount of \$119,778,893. In 2007, the Company spent \$112,194,565, which was \$7,600,000 less than the tracker amount. Further, from January 1, 2008 through June 19, 2008, Consumers Energy spent \$52,367,274 in fossil generating plant O&M expense. Mr. Kehoe also stated that over the period from January 2006 through June 19, 2008, the Company spent a total of \$295,833,318 on this category, which is \$3,594,876 more than the cumulative tracker amount of \$292,238,442 for that period of time. (Exhibit A-4.) Mr. Kehoe explained that his exhibit tracks fossil fueled plant O&M expense only through June 19, 2008, because the Commission did not renew the tracking mechanism for this category of expense in its June 10, 2008 order in Case No. U-15245. The rates in that order were implemented on June 20, 2008. (2 Tr 39-40.)

Mr. Kehoe also testified that customers benefited from the Company spending more than the tracker amount in 2006 and less in 2007 and 2008. He stated that the acceleration of O&M spending resulted in "a quicker improvement in the efficiency and reliability of our generating units during this period." (2 Tr 40.) Mr. Kehoe indicated that this improvement is evidenced by a reduction in the Random Outage Rate (ROR), which is a metric that identifies the percent of time a generating unit is unable to generate electricity due to unplanned or random equipment failure. (2 Tr 41.) Mr. Kehoe explained that when a Consumers Energy fossil unit is forced off-line due to an unplanned event, the Company purchases the replacement power from the market at the current market price. Because market prices in 2007 were substantially higher

than Consumers Energy's cost, the reduced ROR in 2007 directly benefited customers through reduced power supply cost recovery rates. (2 Tr 41.)

Mr. Rasmussen presented the details concerning the Company's nuclear plant O&M expenditures. He explained that the nuclear plant O&M tracking mechanism was in effect from January 11, 2006 through April 10, 2007, when the Palisades Nuclear Plant was sold. Mr. Rasmussen sponsored Exhibit A-9, which shows the actual amount of nuclear O&M expense for the relevant time period and then compares that to the tracker amount. That exhibit shows that Consumers Energy spent \$130,127,730 in 2006 compared to the annual tracker amount of \$117,986,000. Expenditures for 2007 (through April 10, 2007) were \$34,313, 701. As a result, for the entire period in which the tracker was in place, the Company spent \$164,441,431 as compared to the total tracker amount of \$149,842,220.

Mr. Rasmussen further testified that for the total of the three categories, i.e., forestry O&M expense, fossil fueled plant O&M, and nuclear plant O&M expense, the Company's spending exceeded the amounts included in customer rates by \$24,000,000. He stated that at no time did the Company's cumulative spending under the tracking mechanisms fall below the amount that had been included in customer rates. (2 Tr 57; Exhibit A-14.)

Mr. Rasmussen opined that the Commission adopted the tracking mechanisms to encourage expenditures in certain areas of the Company's operations where they would be expected to have customer benefits and to discourage the Company from diverting these resources to other areas. He stated that:

I do not believe that the pattern of expenditures; i.e., the specific amounts spent within each calendar year, should be considered more important

than whether the Company actually spent over the entire relevant time period what was included in rates, or more important than whether the work that the Commission intended those rates to fund was accomplished. Because the Company did spend the tracker amounts, and did accomplish the intended purposes of the tracking mechanisms, I believe it is fair to characterize the Company's actions as being in compliance with the Commission's orders. (2 Tr 52.)

The Staff offered Exhibit S-1 into evidence, which is a letter from Consumers Energy and signed by David W. Joos, President and CEO, and Ken Whipple, Chairman of the Board of CMS Energy Corporation and Consumers Energy. The letter was provided in response to ordering paragraph L of the December 22, 2005 order in Case No. U-14347. In the letter, the Company agrees that if it spends less than the amounts approved for forestry O&M expense, fossil fueled generating plant O&M expense, and nuclear plant O&M expense in 2006 and succeeding calendar years, it will refund the difference subject to certain limitations on the refund obligation for fossil fueled generating plant O&M expense and nuclear fueled generating plant O&M expense.

POSITIONS OF THE PARTIES

The inquiry in this case is whether Consumers Energy has complied with the obligation to either spend the amounts included in rates for forestry O&M expense, fossil fueled generating plant O&M expense, and nuclear plant O&M expense or to refund the amounts not spent.²

Consumers Energy takes the position that it has complied with the obligation to spend the amounts included in rates and that no refunds are appropriate. The

² Although the Commission required Consumers Energy to provide thorough and complete details regarding the Company's expenditures for all three categories of O&M expenses for each of the calendar years 2006, 2007, 2008, and 2009, it only expressed concern in its show cause order regarding the under spent amounts for forestry/line clearing and fossil fueled plant O&M during 2007. (October 13, 2009 order, p. 4.) As a result, the nuclear O&M expenses are not at issue in this case.

Company argues that its understanding that expenditures could be accelerated or “frontloaded” and still be consistent with the tracking mechanisms is supported by the applicable finding and ordering paragraphs in the Commission’s December 22, 2005 order in Case No. U-14347. Specifically, the Company contends that in both paragraphs, the Commission distinguished between the reporting requirement and the expenditure requirement. It points out that the Commission included the word “annual” in discussing the reporting requirement, but did not include the word “annual” in discussing the expenditure requirement. According to Consumers Energy, neither the finding paragraph nor the ordering paragraph states that the expenditure level must be met each year on a stand-alone, year-by-year basis and that it cannot be examined on a cumulative basis.

Consumers Energy further argues that its January 6, 2006 letter does not require a different conclusion. It points out that, like the Commission’s order, the portion of the letter addressing the reporting requirement refers to annual tracking reports. In contrast, the Company states that the paragraphs in the letter addressing the expenditure requirements list the annual amounts but group the years as “calendar year 2006 and in succeeding calendar years.” It explains that because it could not be known at the time of the letter how long each of the tracking mechanisms would be in place, the only dollar amount that could be referenced was the annual amount included in setting rates in Case No. U-14347. However, Consumers Energy submits that the letter does not state that the failure to spend the tracker amount in each year would result in a refund of the unspent amount. In short, it asserts that the letter does not evidence any understanding by the Company that it was precluded from accelerating expenditures in

the first year and then looking at the cumulative level of tracked expenditures in evaluating whether it had spent the required amounts.

The Company next argues that a troubling aspect of the October 13, 2009 order to show cause concerns the timing of the order. It points out that the annual report referenced in the order covered calendar years 2006 and 2007 and is dated April 30, 2008. The annual report is embodied in Exhibit A-6 and indicates that, in each of the three categories of O&M expense at issue, Consumers Energy indicated that it spent in excess of the amounts required by the Commission. It then stated that, as a result, “there is no refund due for amounts not spent.” Thus, the Company submits that its understanding of how the tracking mechanisms would be administered has been a matter of public record since April 30, 2008. However, the order to show cause was not issued until approximately 18 months thereafter. As a result, Consumers Energy states that it continued to take actions for 2008 and 2009 that were based, in part, on an understanding that has now been called into question by issuance of the order to show cause.

Consumers Energy asserts that the submission of the April 30, 2008 report, and the apparent acceptance of that report without comment for 18 months, calls into question the fairness of now imposing refund obligations and other penalties on the Company, which are based upon an interpretation of the tracking mechanisms that is different from that set forth in the 2007 report. The Company submits that this is especially so when the undisputed evidence shows that it actually spent more than was included in rates for the three O&M expense categories and achieved the operational

and customer-oriented results that were the reason for the expenditures in the first place.

Consumers Energy goes on to argue that its understanding is also consistent with the purposes for which the Commission adopted the tracking mechanisms. In Consumers' view, the annual reporting requirement provided a means to monitor expenditures annually and verify whether, at any given time, overall cumulative expenditures exceeded the tracker amounts. The Company points out that the undisputed evidence demonstrates that over the period covered by the tracking mechanisms, Consumers Energy's total expenditures on the three areas of O&M expense covered by the tracking mechanisms exceeded the amounts included in rates by \$24,000,000.

Moreover, Consumers Energy asserts that the unrebutted evidence also shows that customers were benefited by the pattern of expenditures made by the Company. It maintains that by accelerating the forestry/line clearing and fossil generating plant expenditures, customers received benefits sooner than would have otherwise been the case. Although the Company states that it could have delayed a portion of the earlier expenditures to later years so that the actual expenditures and tracker amounts matched on a calendar year basis, this would not have benefited customers and, in fact, it would have actually delayed service reliability improvements.

Furthermore, Consumers Energy emphasizes that compliance with the tracking mechanisms in this proceeding must be measured against at least three different rate orders, i.e., the December 22, 2005 order in Case No. U-14347, the June 10, 2008 order in Case No. U-15245, and the November 2, 2009 order in Case No. U-15645.

The Company points out that the history of the forestry tracker as embodied in these orders indicates large swings in amounts approved by the Commission, both up and down.³ Consumers Energy states that notwithstanding the unpredictability of these regulatory changes, and the managerial adjustments they required, it nevertheless made sure that it spent more than the amount included in rates over the relevant time period. It therefore submits that it is unreasonable to consider imposing refund obligations and potential fines for its actions in managing this activity over this time period. The Company acknowledges that if spending is analyzed over different discrete segments of time, no doubt an argument could be made that spending did not always perfectly match what was included in rates over the corresponding time periods. However, viewed over the entire relevant time period, Consumers Energy submits that it spent all that was included in rates plus more and, therefore, this is not managerial action that warrants a penalty.

Finally, Consumers Energy submits that it was not enriched by the manner in which it spent the funds for each of three areas of O&M expense, because it spent more than the amounts that were included in rates. The Company therefore contends that it would be unreasonable and unlawful to order a refund of these amounts.

The Staff asserts that Consumers Energy's position on trackers is incorrect, and that the tracker amounts are to be met each year and cannot be considered cumulative. Contrary to the Company's position, the Staff interprets the Commission's December 22, 2005 order to mean that the trackers were to be annual trackers and failure to spend the annual tracker amounts *each year* would result in a refund. In the

³As indicated earlier, in the December 22, 2005 order in Case No. U-14347, the forestry tracker amount was \$28,300,000; in the June 10, 2008 order in Case No. U-15245, it was \$41,535,660; and in the November 2, 2009 order in Case No. U-15645, it was \$30,000,000.

Staff's view, the Company's January 6, 2007 letter clearly shows that Consumers understood this.

Furthermore, the Staff asserts that the refund provision demonstrates that the trackers could only be annual trackers, because if the trackers were cumulative, Consumers Energy could end up not owing a refund in any year, even if it spent less than the tracker amounts. According to the Staff, the Company would then argue that it would make up for that under-spending in the next year. The Staff contends that such a situation was not the intent behind the trackers, because they were established in order to make certain that Consumers Energy spent at least the tracker amount each year on forestry and fossil-fueled plant O&M. Moreover, the Staff points out that on cross-examination, Mr. Rasmussen admitted that the Commission did not set up a multi-year reporting requirement. The Staff therefore concludes that the Commission should find that Consumers Energy has violated the December 22, 2005 order in Case No. U-14347 for failure to meet the annual tracker requirements and order the Company to refund \$16,202,817 for forestry O&M expense and \$11,179,323 for fossil fueled plant O&M expense.

The Attorney General supports the Staff's position. He agrees that the tracking mechanisms were clearly for annual amounts and not cumulative amounts that could be reduced or exceeded at the Company's discretion. In the Attorney General's view, allowing Consumers Energy to decide what year and how much it will spend defeats the purpose of the trackers and makes them difficult to monitor. He therefore supports the Staff's requested relief in this case.

DISCUSSION AND FINDINGS

In deciding whether Consumers Energy has complied with the obligation to either spend the amounts included in rates for forestry O&M expense and fossil-fueled generating plant O&M expense or to refund the amounts not spent, it is first necessary to examine the purpose of the tracking mechanisms.

As Consumers Energy notes, of the amount that the Staff argues should be refunded, the largest portion, i.e., \$16,202,817, is related to the forestry tracker. In its December 22, 2005 order in Case No. U-14347, the Commission found that Consumers Energy's tree trimming and line clearance programs had been unsatisfactory in recent years. In particular, the Commission observed that, "in the past few years, Consumers has sacrificed necessary expenditures for tree trimming and line maintenance so that the company could increase its cash flow and fund employee bonuses." (Order, p. 54.) In its order to show cause, the Commission emphasized that it had approved the forestry expense tracking mechanism "out of concern that the quality of service then being experienced by Consumers' customers would likely be enhanced if the utility had more funds available with which to perform tree trimming and line clearance activities." (October 13, 2009 order, p. 1.) As a result, the Commission found in its December 22, 2005 order that funds for these programs should be closely monitored through annual reporting.

Thus, in the context of the Commission's discussion of this issue, it is apparent that the purpose of establishing the tracker was to provide a mechanism whereby the funds would be closely monitored through annual reporting to ensure that the Company actually used the funds for the intended purpose of improving tree trimming and line

clearance, thereby enhancing the quality of service to customers. In short, the Commission wanted to make sure that the Company used the funds for this purpose and did not divert them to other purposes such as increasing its cash flow and funding employee bonuses.

The Administrative Law Judge therefore disagrees with the Staff's position that the trackers were established in order to "make certain that Consumers Energy spent at least the tracker amount each year on forestry and fossil-fueled plant O&M" (Brief, p. 5.) Although the Staff is correct that the Commission wanted to make sure that the funds would actually be used on forestry and fossil fueled plant O&M expenses, it did not state that spending had to match what was included in rates each year the trackers were in effect.

Furthermore, the fact that Mr. Rasmussen acknowledged on cross-examination that the Commission did not adopt a multi-year reporting requirement does not support the Staff's position that the Company was required to spend the approved tracker amounts each year. Rather, the Administrative Law Judge agrees with Consumers Energy that the Commission distinguished between the reporting requirement and the expenditures requirement in its December 22, 2005 order. The relevant sections of that order are as follows:

The Commission FINDS that:

* * *

m. Consumers should be directed to submit a letter, signed by the Chairman of Consumers Energy on behalf of the company, which agrees to make the additional forestry expenditures as well as the additional fossil and nuclear operations expenses or to refund any unexpended amounts to its customers. The letter should also contain a waiver of Consumers' right to object to the refund provisions on grounds of

retroactive ratemaking and an agreement to submit annual tracking reports regarding forestry and tree-trimming to the Staff.

* * *

THEREFORE, IT IS ORDERED that:

* * *

L. Consumers is directed to submit a letter, signed by the Chairman of Consumers on behalf of the company, which agrees to make the additional forestry expenditures as well as the additional fossil and nuclear operations expenses or to refund any unexpended amounts to its customers. The letter shall also contain a waiver of Consumers' right to object to the refund provisions on grounds of retroactive ratemaking and an agreement to submit annual tracking reports regarding forestry and tree-trimming to the Staff. (Order, pp. 89 and 92.)

This language supports the conclusion that the Commission did not mandate that the approved tracker amounts be spent in each and every year that the trackers were in effect and that failure to do so would result in a refund. Had the Commission intended Consumers Energy to spend the approved tracker amounts each year, it would have instructed the Company to "make the additional forestry expenditures as well as the additional fossil and nuclear operations expenses or to refund any unexpended amounts to its customers *on an annual basis*." However, the Commission did not say that and, instead, it required the Company only to submit annual tracking reports regarding forestry and tree-trimming to the Staff. The word "annual" refers only to submission of the tracking reports, not to the expenditure of the funds. This is consistent with the purpose of the annual tracking reports to closely monitor whether the funds were used for their intended purpose, not to make sure that the funds were spent in an exact annual pattern.

The Administrative Law Judge also disagrees with the Staff's assertion that the January 6, 2006 letter clearly shows that Consumers Energy understood that the tracker was to be an annual tracker and failure to spend the tracker amount each year would result in a refund of the unspent amount. That letter states, in pertinent part:

(1) If, in calendar year 2006 and in succeeding calendar years, Consumers Energy expends less than \$28.3 million for forestry (e.g., tree trimming, line clearing) expenses as described in that order, it will refund the amount by which its actual forestry expenses are less than \$28.3 million;

* * *

(5) Consumers Energy agrees to submit to the MPSC Staff annual tracking reports identifying forestry expenses. (Exhibit S-1.)

The letter uses the same language "in calendar year 2006 and in succeeding calendar years" to address the expenditure requirements for fossil fueled O&M expense and nuclear fueled generating plant O&M. Contrary to the Staff's interpretation, the letter is ambiguous and does not clearly state that failure to spend the tracker amount in each calendar year would result in a refund of the unspent amount. Thus, it is not evidence that Consumers Energy knew that it was precluded from accelerating the expenditure of the approved amounts in the first year and then examining them on a cumulative basis to determine whether the required amounts had been spent.

The Administrative Law Judge further finds that the undisputed evidence demonstrates that on a cumulative basis Consumers Energy did, in fact, spend all of the funds included in rates on the three categories of O&M expense and then some, i.e., \$24,000,000 more than was included in rates. Moreover, the undisputed evidence also demonstrates that Consumers Energy used the funds for the purposes for which they were intended and achieved customer benefits in doing so. The Company presented

extensive testimony regarding the work that was accomplished and the benefits that resulted from that work. As to the forestry O&M spending, Mr. Ford testified that customers were not harmed as a result of the Company managing the expenditure levels as it did and, in fact, they benefited more from the acceleration of those expenditures. He explained that:

Over this time period Consumers Energy customers will have received a similar reliability benefit from the actual spending over the 2006 through forecasted 2009 approach relative to what would have been expected if actual expenditures had matched the forestry tracker spending levels over this same time period on a calendar year basis. This conclusion is based on the miles of LVD and HVD line cleared and customers directly served from these cleared lines. *If anything, as a result of the accelerated spending in 2006, customers began receiving benefits sooner than they would have if spending levels had met the annual forestry tracker level for that year.* Thus, the electric service reliability goals that the Commission expected the Company to achieve as a result of adopting the forestry tracker mechanism were in fact achieved. (2 Tr 26, *emphasis added.*)

Furthermore, Mr. Ford pointed out that, in response to the Commission's order in Case No. U-15605, the Staff conducted an extensive investigation into storm-related outages that occurred in June 2008. The investigation included a review of tree trimming practices. In its report, the Staff reached the following conclusion:

Given the severity of the storms in Consumers Energy's territory, Staff believes Consumers Energy did everything in their power to restore customers as quickly as possible. Further, Staff believes that the general public is of a similar opinion, as evidenced by the reduced levels of customer complaints taken shortly after the storm event, that only one Consumers Energy customer made a statement in the combined public hearings that were held, and also the relatively lower level of written comments submitted to the docket by Consumers Energy customers as opposed to Detroit Edison customers. Although Consumers Energy did receive some complaints in the written comments submitted to the docket, and also a few complaints made to the MPSC during the restoration efforts, Consumers Energy, with the help of Great Lakes Mutual Assistance crews, was able to restore their customers within 5 days in areas that were declared federal disaster areas. Given the

severity of the storms, Staff is of the opinion that Consumers Energy acted quickly and did everything possible to restore their customers in a timely manner. (Outage Investigation Report, pp. 12-13; 2 Tr 27.)

The Administrative Law Judge therefore agrees with Consumers Energy that the undisputed evidence demonstrates that by spending more on forestry/line clearing activities earlier during the 2006-2009 period, the Company was able to improve its performance in this area and achieve reliability benefits sooner than would have otherwise been the case. It also shows that had the Company decreased spending in 2006 and increased spending in 2007 and 2008 in an effort to more precisely match spending with the tracker amounts on a calendar year basis, it would have actually delayed these improvements. This, in turn, would have had a negative impact on the Company's ability to restore their customers after the 2008 storm event.

Similarly, Mr. Kehoe indicated that the acceleration of fossil fueled plant O&M spending in 2006 resulted in quicker improvement in the efficiency and reliability of the Company's generating units. He explained how customers benefited from this acceleration of spending:

By accelerating the O&M spending to the early stages of the period covered by the U-14347 Order and focusing our efforts on the repair and maintenance of equipment that had the greatest need, our investment had more immediate benefits to customers in the form of reduced power supply expenses.

This resulted from the more rapid improvement in the reliability of the Consumers Energy fossil generating fleet. *This improvement is evidenced by the Random Outage Rate (ROR). In 2006, the ROR for the Consumers Energy coal-fired fleet was 10.22%. As a result of our increased O&M spending in 2006, the 2007 and 2008 ROR was reduced to 6.53% and 8.84% respectively and saved our customers approximately \$14.8 million. (2 Tr 40-41, emphasis added.)*

* * *

Mr. Kehoe also described other benefits realized as a result of accelerating spending in 2006:

In late 2006 and early 2007, our largest generating unit (Campbell 3) was undergoing a major capital outage. It was logical to perform needed O&M repairs during that outage. *It would have been illogical to delay that work into a subsequent year, thus incurring another outage, just to levelize the O&M spending. Approximately one-third of the additional O&M spent in 2006 was associated with Campbell Unit 3. (2 Tr 41, emphasis added.)*

In addition, Mr. Kehoe stated that the turbine repairs and maintenance on Campbell Unit 3 resulted in improved heat rate. He explained that as heat rate improves, the amount of fuel (coal) needed to produce the same electricity goes down. As a result of having to use less fuel, the Company was able to lower power supply cost recovery rates for its customers. (2 Tr 41-42.) Mr. Kehoe's testimony clearly demonstrates that by spending more money on O&M activities earlier, Consumers Energy was able to achieve efficiency gains earlier, which directly benefited customers.

Both Mr. Ford's and Mr. Kehoe's testimony regarding the benefits the Company achieved by accelerating spending supports the conclusion that the pattern of expenditures, i.e., the specific amounts spent within each calendar year, should not be considered more important than whether the Company actually spent what was included in rates over the entire relevant time period or more important than whether the work that the Commission intended the rates to fund was accomplished. Again, the undisputed evidence demonstrates that Consumers Energy did this and, consequently, the Administrative Law Judge agrees with the Company that this is not the kind of managerial action that warrants a refund or a penalty.

Based on the foregoing discussion, the Administrative Law Judge concludes that Consumers Energy has not violated the Commission's December 22, 2005 order in Case No. U-14347 and no refunds are due customers.

CONCLUSION

The Administrative Law Judge recommends that the Commission issue an order adopting her findings and conclusions.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS & RULES

Barbara A. Stump
Administrative Law Judge

ISSUED: March 29, 2010